

Dear Jim,

2/23/85

If there is any market for a 72 year old (almost) babysitter, I'm getting experience. Last night great-great nephews 5 and 7 along with mother-in-law who is 95 and right now mother-in-law only. While she is napping nearby and Lil is grocery shopping, this is to let you know that as of today's mail nothing from the appeals court and that there is nothing urgent enclosed. There must be quite an accumulation on your return from earth-girdling. I want to be nearby when the old gal starts moving around because I remember my grandmother's suffering and death when she fell on getting out of bed and broke a hip.

Off and on this past week I've been thinking about the possibilities at the court. While I remain optimistic about the outcome I think it also is possible that the panel is taking time to clobber me with more care. And I believe that it is possible that I succeeded in my minimum objective, of equipping the traditionalist minority to cope with the activist majority without the prejudices that still are attached to such things as homosexuality in the military, with factually irrefutable arguments still in a proper political context. I believe also that I have mortified the activists, embarrassed them as they have not been in any other case. Of which I know, of course.

Let us assume for the moment that in the end I do prevail and an alternative, that I do not prevail but get a strong minority dissent. Please for the moment forget the other possibilities and think in terms of these two only, and with regard to one without regard to the alternative it presents, to which I'll return.

With either of these two alternatives lawyers should find voice because of what is involved for lawyers. It may well be that this can be done most effectively by paying no heed to me and the position in which I am, although I am inclined to believe that the exact opposite is more likely. But either way, with what the panel had done to lawyers and to the Act, I think there should be some attention from lawyers to this fundamental departure from American concepts of law and justice and the unhidden and basely, really contrived, assault upon lawyers in general and those who represent clients who cannot pay them in particular. I believe that in the interest of lawyers, of the Act and of what has happened to justice and the courts this is necessary and no better case for such purposes is likely to be available in the near future.

Because of my age, health, lack of financial resources and, ^I am in an unpaid public role what the papers regard as the feature or human-interest aspect might underscore the whole thing. I'm not sure and as you know, I have no interest in personal attention per se.

As I've said before, doing anything can be risky for one lawyer, but this will not be true if there is a group and its position is impersonal, professional and principled. There is nothing wrong with public complaint about bias and prejudice in the courts or about departures from traditional norms by the courts.

History tells us that if reaction is not opposed it grows stronger and more reactionary, so it must be opposed and is best opposed with attention to its greater outrages. In political and legal matters, as in military, the best defense is a good offense and the greater the disparity of forces the truer this is. Remember my story about the French general at the battle of the Marne, who said that with one flank in retreat, the other turned and his center crumbled, "Good! I attack!" And he won. It is a truism of life and as you know in my life I'd not have survived otherwise. You ought to be able to remember at least three such things that otherwise would have been ruinous and at least one major legal precedent I set when ostensibly I was already overwhelmed. So my personal experience is consistent with the teaching of history, but in my present circumstances taking any initiatives other than the few backgrounding letters to a few in the mass media is beyond my financial and physical capabilities. If I were still a young man of 62 I'd be ready to be off and running.

All of you lawyers are always too busy and that is always the convenient excuse you have for avoiding what you may want to avoid, but I suggest that given the political and judicial situation in the land today there is nothing much more important than making the kind of effort I suggest. It will require some conferring and getting others to see and comprehend, but that is always true and ought not be too great a problem.

One possible substitute would be to get a lawyer who is not afraid of reaction or retaliation against him to take some of the available initiatives. The kind of lawyer Phil Hirschkop was before he latched onto the ~~FBI~~ Hunts. (He may still be, I don't know one way of the other.) Maybe a Ramsey Clark.

From history and from my life, experiences and observations you'll all be very sorry if you do not exploit this incredible situation effectively and on principle and in the articulated interest of the judicial system itself.

Now, with what the case record today holds, I get to being defeated, with or without well-articulated minority views.

Despite the composition of the Supreme Court and despite the odds against the granting of cert, I think this ought then go up. If it is not granted, nothing but a little time and cost is wasted. If it does, even with this court, it can have enormous consequences. (Without moving Rehnquist's recusal, for he was involved in my cases when he was at Justice, and I've never asked Tamm to recuse himself, although he was prejudicially involved more than three decades ago when he was in the FBI.) The overt lies are not comparable with such things as the exclusionary rule and the panel's excesses and ignorance are not easily ignored.

Then, too, remember 1974 and what happened then, even if the political situation today may appear to be less propitious now. Whatever it may be of is now need not be and I think will not be what a year or two hence in the Congress, when the full impact of the ~~Reagan~~ Reagan counterrevolution (which he calls revolution) begins to be felt. We are racing toward great disasters, as I forecast years ago when we were discussing alternatives to Jimmy Carter. The Reaganite opposition is going to get stronger and not only more articulate, but less unwilling to be pointed and direct. Were my 1974 ^{not} Ford forecasts correct in even small detail? Remember our discussions with Ellsworth and other Nader lawyers? Was I not correct in telling them that Ford would doublecross them on their deal and that Congress would override his veto? I'm not saying that the same thing can or will happen but I am saying that we are getting to a similar political situation, that it can hold similar or comparable political possibilities and that at the very least those who care about the country, about meaningful freedom and decency, must be prepared and must take the preliminary steps in preparation.

There is, as I see it and you may not, as good a situation for what I refer to as intellectual judo as can be expected and it ought not be wasted. Nor ought it rest only on me, particularly not now when I am so limited.

There is hardly a weaker adversary confronting much greater power, and that makes ~~for~~ a dramatic situation that can achieve some attention and thus accomplish more good. One aging, weak and ill man against the FBI, DJ and both courts? But whenever I look up from my desk I see the engraved rectangle of marble a student gave me some years ago, quoting, and I think slightly misquoting Andy Jackson (without attribution), "One man with courage becomes a majority." I think he spoke of a determined man, but no matter. There are possibilities and I hope you can find time to at least think about them. Also please remember what I asked Mark Allen to research for me.

Welcome home!

Henry